NO. 81-6245

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1981 TERM

CHARLES LAVERNE SINGLETON — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

STEVE CLARK
ATTORNEY GENERAL

By: VICTRA L. FEWELL
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007
ATTORNEYS FOR RESPONDENT

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Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a capital defendant's Sixth and Fourteenth Amendment rights are violated by a trial court's refusal to exclude for cause a venireman who indicates that he prefers the death penalty for all persons convicted of capital murder.

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OPINION BELOW

The opinion of the Arkansas Supreme Court is Singleton v. State, 274 Ark. 126, 623 S.W.2d 180 (1981).

JURISDICTION

The petitioner has adequately set forth the grounds for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner has adequately set forth the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

The petitioner has adequately set forth the facts of the case.

REASON FOR DENYING THE WRIT

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT'S REFUSAL TO EXCLUDE FOR CAUSE A VENIREMAN WHO STATED THAT HE WOULD FOLLOW THE LAW IN THE DETERMINATION OF GUILT AND SENTENCE.

Petitioner alleges here, as he did on direct appeal to the Arkansas Supreme Court that his constitutional rights were violated when the trial court refused to excuse for cause venireman Raymond Taylor, who initially indicated a preference for the death penalty for those convicted of capital murder. Petitioner has generally quoted only those portions of the voir dire of Mr. Taylor which support his allegation.

After defense counsel explained to Mr. Taylor how the sentencing phase would be conducted if petitioner were found guilty and briefly outlined the instructions with regard to sentencing, he asked if Mr. Taylor could "consider mitigating circumstances and weigh then and come back with a sentence of life imprisonment without parole," Mr. Taylor replied, "I think I could." (T. 341) When asked if he would feel pressure to return the death penalty because some of his friends believed that convicted murderers deserve to die, Mr. Taylor replied, "No. Friends ain't got anything to do with it." Mr. Taylor then indicated that he would do what he thought was right based on the evidence. (T. 342) Mr. Taylor also agreed to be guided by and to follow the law in his determination of the case. (T. 349-350)

Respondent cannot deny that Taylor stated that he believed, as a general rule, that anyone who is convicted of capital murder should be executed. It is highly significant, however, that when defense counsel described the penalty phase of the trial, Taylor stated that he could consider and weigh mitigating circumstances and render a verdict of life without parole.

If the circumstances were reversed in this case, Taylor would not be excusable for cause pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). While he preferred one of the

possible penalties over the other, he stated clearly that he could return life without parole if the evidence warranted it. To be excusable on Witherspoon grounds by the State, he would have had to state unequivocally that he would never impose the death penalty; conversely, to be excusable by the defense on analogous grounds, he would have had to state unequivocally that he would never return a sentence of life without parole. He certainly did not go that far. For the State to be allowed to excuse Taylor merely because of his beliefs about the death penalty would violate Witherspoon; it would be just as improper to allow the defense to have him excused because of his beliefs when he stated that those beliefs would not preclude his acting otherwise.

This Court seemed to recognize the class of jurors to which Taylor belongs when it noted in Witherspoon, 394 U.S. at 519: "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." The standard for excusal by the State under Witherspoon was set out at 391 U.S. 522 n. 21. If that language were paraphrased to state a standard for excusal by the defense on analogous grounds, it would read: The only veniremen who may be excluded for cause are those who make unmistakably clear (1) that they would automatically vote for the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Taulor did not take either of those positions.

It can be inferred from this Court's opinion in Boulden v. Holman, 394 U.S. 478 (1969), that a juror must be considered fair and impartial and cannot be excused on Witherspoon grounds, even if he has a "fixed opinion" against capital punishment, if he states that he is able "to follow conscientiously the instructions of the trial judge and to consider fairly the

imposition of the death penalty in a particular case." Id., 394 U.S. at 484. Similarly, Taylor could serve fairly and impartially, despite a "fixed opinion" in favor of capital punishment, since he would follow the instructions of the trial court and consider fairly the imposition of the other possible penalty, life imprisonment without parole. He stated that he could do this, and the trial court evidently found his testimony credible. That is all that is required.

One other distinction might need to be made regarding the seating of a juror with strong feelings or beliefs regarding the death penalty. Ark. Stat. Ann. §41-1302 (Repl. 1977) requires that the jury be unanimous in its findings that the death penalty should be imposed. If even one juror refuses and the jury hangs on this issue, the trial court must impose life without parole. §41-1302(3). This explains to some extent the purpose of the Witherspoon rule, because even one juror could prevent the State from imposing a valid penalty. The converse is not the case, however. The requirement of unanimity always gives the advantage to the defendant. Even assuming, for the sake of argument, that Taylor would have voted to impose the death penalty, that vote would carry absolutely no weight without the votes of all other 11 jurors.

According to Taylor's own testimony, his position can be fairly characterized as no more than a strong belief in the death penalty, tempered by a willingness to consider and impose both possible penalties. Thus, the trial court did not err in finding him competent to serve.

Respondent will not deny that the constitutional safeguards attending the penalty phase of a capital murder trial are equally significant to those in the guilt phase. This Court has held, however, that a prospective juror may be seated even if he has expressed some preconceived opinion about the defendant's guilt, so long as it is adequately demonstrated that he can set aside that opinion, follow the law and the instructions

of the trial court and decide the case based only on the evidence presented. Dobbert v. Florida, 432 U.S. 282 (1977); Murphy v. Florida, 421 U.S. 794 (1975). It seems equally logical that a venireman with a preconceived opinion about penalty is not automatically disqualified if he is willing to set aside that opinion and be guided by the law and the evidence in deciding penalty.

A defendant is not entitled to a perfect jury, even in a capital murder case, and, if he were, defense attorneys would probably differ from each other and from the court on what constituted such a mythical creature. Defendants would obviously prefer jurors strongly opposed to the death penalty, while the State obviously prefers those strongly in favor of it. Neither side is entitled to its preferred composition, and neither is entitled to eliminate those prospective jurors whose beliefs are unfavorable, so long as they all swear to follow the law and the instructions and give both sides a fair trial.

It should be noted that petitioner's only allegation of possible prejudice was that he had to exercise a peremptory to keep Mr. Taylor off the jury. While respondent submits that Mr. Taylor could properly have served, a slightly different question might have been presented had he actually sat on the jury. In short, there is no allegation that the jury which determined petitioner's guilt and sentence were in any way tainted by Mr. Taylor's attitutde.

The Arkansas Supreme Court correctly decided this issue in Singleton v. State, 274 Ark. 126, 623 S.W.2d 180 (1981).

> Appellant exercised a peremptory challenge on each of these prospective jurors but made no showing of record that he would have struck any other juror who actually sat on the trial of the case had he had a peremptory challenge remaining. Under such circumstances we have consistently held that appellant has shown no prejudice since he is unable to show that an objectionable juror was forced upon him without his having the privilege of exercising a peremptory challenge....
>
> * * *

> Appellant argues for the first time on appeal that he would have exercised peremptory challenges on two specific jurors had the court granted his challenges for cause. The record does not reflect that the two jurors specified were biased or otherwise unqualified to serve. This Court has consistently held that it will not consider alleged errors raised for the first time on appeal....

Singleton, 274 Ark. at 129-30 (citations omitted).

In other words, the Arkansas Supreme Court found no showing of prejudice with regard to any of the trial court's rulings on prospective jurors because there was no allegation at trial that any of the seated jurors was objectionable. The Arkansas Court requires such a showing at trial or the issue is deemed procedurally waived. This Court is barred from considering petitioner's implication at page 8 of his brief that he would have excused a particular juror who had been a victim of a crime if he had a peremptory remaining, as this was not preserved at trial and was found procedurally barred by the Arkansas Supreme Court. Wainwright v. Sykes, 433 U.S. 72 (1977).

CONCLUSION

This Court should deny the petition for writ of certiorari because this issue was decided properly by the Arkansas Supreme Court, which applied federal constitutional provisions.

Respectfully submitted,

STEVE CLARK
ATTORNEY GENERAL

By: VICTRA L. FEWELL
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007
ATTORNEYS FOR RESPONDENT